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No. 84-1794

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPH GERACE, COMMISSIONER, NEW YORK DEPARTMENT OF AGRICULTURE AND MARKETS, ET AL., APPELLANTS

v.

GROCERY MANUFACTURERS OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

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QUESTION PRESENTED

1. Whether federal packaged food labeling requirements governing "imitation" products preempt "imitation cheese" labeling requirements imposed by New York law.

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OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-28a) is reported at 755 F.2d 993. The opinion of the district court (J.S. App. 29a-58a) is reported at 581 F. Supp. 658.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1985. The appellant in No. 84-1794 filed a notice of appeal on May 3, 1985, and invokes this Court's jurisdiction under 28 U.S.C. 1254(2). The petitioner in No. 84-1807 filed a petition for a writ of certiorari on May 15, 1985, and invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

STATEMENT

1. The Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. (& Supp. I) 301 *et seq.*, empowers the Food and Drug Administration (FDA) to prescribe generally applicable labeling requirements for packaged foods shipped in interstate commerce. 21 U.S.C. 341-343, 371. In similar fashion, the Poultry Products Inspection Act (PPIA), 21 U.S.C. 451 *et seq.*, and the Federal Meat Inspection Act (FMIA), 21 U.S.C. 601 *et seq.*, empower the United States Department of Agriculture (USDA) to prescribe labeling requirements for packaged poultry and meat products shipped in interstate commerce. 21 U.S.C. 453(h), 457 (PPIA); 21 U.S.C. 601(n), 607 (FMIA). The PPIA and the FMIA, in addition, contain specific preemptive provisions prohibiting states from imposing "[m]arking, labeling, packaging, or ingredient requirements" that are "in addition to, or different than" those required by the statutes. See 21 U.S.C. 467e (PPIA); 21 U.S.C. 678 (FMIA).

All three federal statutes specifically prohibit the misbranding of products. See 21 U.S.C. 343 (FDCA); 21 U.S.C. 453(h) (PPIA); 21 U.S.C. 601(n) (FMIA). The statutes all provide that a product shall be considered misbranded if:

> it is an imitation of another food, unless its label bears in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated.

21 U.S.C. 343(c) (FDCA); 21 U.S.C. 453(h)(3) (PPIA); 21 U.S.C. 601(n)(3) (FMIA). The statutes do not define the word "imitation."

Since 1973, the FDA has defined an "imitation" product as a food that "is a substitute for and resembles another food but is nutritionally inferior to that food." 21 C.F.R.

101.3(e)(1). See 38 Fed. Reg. 2138 (1973); *id.* at 20702. The FDA explained the reasons for this definition, in part, as follows (*id.* at 2138):

> To apply automatically the term "imitation" to new substitute food products which are not nutritionally inferior would be a disservice to consumers and would be contrary to the common understanding that the word "imitation" connotes inferiority. * * *. Indeed, because of the traditional connotation of inferiority, application of the term "imitation" to a substitute food product which is not inferior could be misleading to the consumer in violation of the [FDCA].
>
> Accordingly, the [FDA] has concluded that it is in the interest of consumers and consistent with the general intent of Congress to restrict required application of the term "imitation" to a substitute food which is nutritionally inferior to the food for which it is a substitute.

The USDA has adopted the FDA's definition of "imitation" in administering the PPIA and the FMIA. See *In re Castleberry's Food Co.*, 40 Agric. Dec. 1262 (1981).

2. In 1982, the New York legislature enacted Section 63, N.Y. Agric. & Mkts. Law (Consol. Supp. 1984-1985) (see J.S. App. 64a). Section 63 sets forth special requirements for labeling food products containing "imitation cheese." It requires that such products must be prominently labeled with the words "contains imitation cheese" or "contains imitation cheese food." N.Y. Agric. & Mkts. Law § 63 (Consol. Supp. 1984-1985). It also requires restaurants that offer products containing "imitation cheese" for sale, for carry out, or for consumption on the premises, to post a sign at the place of sale disclosing that the product contains the imitation ingredient. *Ibid.* Likewise, if a product containing

"imitation cheese" is offered by menu, the menu must so disclose. *Ibid.* Further, if "imitation cheese" is placed on a restaurant table or otherwise made available for use by customers, the container must be conspicuously labeled to indicate the presence of the imitation ingredient. *Ibid.*

Section 63 empowers the New York Commissioner of Agriculture and Markets (the Commissioner) to prescribe necessary regulations "including specific identification of imitation cheese and imitation cheese food." N.Y. Agric. & Mkts. Law § 63 (Consol. Supp. 1984-1985). The Commissioner has issued regulations defining "imitation cheese" to include any product "which is similar in texture, color, flavor, taste and appearance" to certain cheeses and cheese foods, but does not meet New York's descriptions, standards of identity, and definitions for those products. N.Y. Admin. Code tit. 18, § 18.(c) and (d) (1983). See J.S. App. 66a-67a; see also J.S. 10-11. Thus, New York's definition of "imitation" cheese differs markedly from the federal counterpart. The New York definition is based on the actual identity of the product as a recognized cheese, while the federal standard is based on nutritional equivalence.

3. The Grocery Manufacturers of America (GMA) brought suit against the Commissioner in the United States District Court for the Southern District of New York, seeking declaratory and injunctive relief. GMA claimed that New York's statute and regulations governing the labeling of cheese products were in direct conflict with the federal regulatory scheme, and hence preempted by federal law. GMA additionally claimed that Section 63's sign, menu and container provisions, applicable to restaurants, impermissibly burdened interstate commerce and violated

federal and state constitutional guarantees of equal protection. The Comissioner asserted that there was no conflict between the state and federal laws. He also counterclaimed against the Deparment of Health and Human Services (as parent agency of the FDA) and the USDA, urging, first, that FDA's regulations defining "imitation" products were inconsistent with the FDCA, and second, that the USDA had adopted the FDA interpretation of the term imitation without following proper rulemaking procedures.

The district court rejected the Commissioner's arguments and permanently enjoined him from enforcing Section 63 and the attendant regulations (J.S. App. 29a-58a). The court, applying a traditional preemption analysis, found that New York's packaged cheese labeling requirements were in direct conflict with federal law (*id.* at 46a-48a). Rejecting the Commissioner's contention that the FDA definition of "imitation" products was inconsistent with the FDCA (*id.* at 49a-53a), the court concluded that the FDA's regulations preempted New York law. The court also sustained the USDA's policy of adhering to FDA's definition of "imitation" products, concluding that it could do so without formal rulemaking (*id.* at 40a-43a) and noting that, in any event, the preemption provisions of the PPIA and the FMIA would preclude New York's labeling requirements. The district court additionally held that New York's sign, menu and container provisions, applicable to restaurants, placed an undue burden on interstate commerce and were therefore invalid under the Commerce Clause (*id.* at 53a-58a). The court did not reach GMA's argument that the sign, menu and container provisions violated equal protection principles.

The court of appeals affirmed in part and reversed in part (J.S. App. 1a-28a). The court found that the federal and state labeling schemes were irreconcilable, and that the provisions of the federal statutes and regulations therefore

preempted New York's labeling requirements (*id.* at 10a-20a). The court of appeals, like the district court, rejected the Commissioner's assertion that FDA's definition of "imitation" products was inconsistent with the FDCA (*id.* at 12a-16a). The court noted (*id.* at 15a) that the FDA's long-standing definition had been upheld previously by two courts of appeals. See, *e.g., National Milk Producers Federation* v. *Harris,* 653 F.2d 389 (8th Cir. 1981); *Federation of Homemakers* v. *Schmidt,* 539 F.2d 740 (D.C. Cir. 1976). The court of appeals also rejected the Comissioner's argument that the USDA had improperly adopted the FDA imitation product policy, noting that the USDA could announce this policy through adjudication and that, in all events, the PPIA and FMIA prohibited New York's additional labeling requirements (J.S. App. 16a-20a).

However, the court of appeals reversed the district court's conclusion that New York's sign, menu and container provisions violated the Commerce Clause (J.S. App. 20a-26a). The court agreed with the Commissioner that the disputed provisions "place a relatively minor burden on commerce and advance an important state interest" (*id.* at 25a). The court rejected GMA's equal protection challenge as "wholly unpersuasive" (*id.* at 27a).

The Comissioner filed a timely notice of appeal (J.S. App. 61a-62a) to this Court, pursuant to 28 U.S.C. 1254(2), for review of the court of appeals' holding that New York's imitation cheese labeling requirements are preempted by federal law. GMA filed a petition for writ of certiorari (No. 84-1807), seeking review of its challenge, under the Commerce Clause and equal protection principles, to the restaurant provisions of the New York law.

ARGUMENT

The court of appeals' conclusion that federal law preempts New York's imitation cheese labeling requirements is plainly correct, and is consistent with the decisions

of this Court, and other courts of appeals. Accordingly, with respect to the Comissioner's appeal, the judgment of the court of appeals should be affirmed.

Under the Supremacy Clause, valid federal law preempts contrary or inconsistent state legislation. Congress may preempt state law law expressly, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977), or by implication through a pervasive regulatory scheme, *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Even if Congress has not completely occupied the field, state law is preempted to the extent that it actually conflicts with federal law. *E.g., Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta,* 458 U.S. 141, 153 (1983). An actual conflict exists when it is impossible to comply with both state and federal law or when state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Ibid.* Preemption is compelled regardless of whether state law conflicts with valid federal statutes or valid federal regulations. *Ibid.*

The Commissioner is plainly mistaken in suggesting (J.S. 22) that New York's "imitation cheese" labeling requirements do not conflict with the federal regulatory scheme. Since 1973, the FDA has relied on a nutritional equivalence standard to determine whether a substitute food product should be labeled as an "imitation." In choosing this standard, the FDA specifically concluded that "it is in the interest of consumers and consistent with the general intent of Congress to *restrict* required application of the term 'imitation' to a substitute food which is nutritionally inferior to the food for which it is a substitute." 38 Fed. Reg. 2138 (1973) (emphasis added). The FDA observed that application of the term "imitation" to products that are not inferior could be misleading and therefore contrary to the FDCA. *Ibid.* New York's decision to define "imitation cheese" based solely on the identity of the product, without

regard to nutritional equivalence, requires the notation "imitation" on products that plainly should *not* be labeled "imitation" under federal law. See 21 C.F.R. 101.3(e)(2) and (3). Thus, the court of appeals and the district court were clearly correct in finding a direct conflict between federal and state law. See J.S. App. 7a-8a, 16a; *id.* at 46a-48a.

The Commissioner is also plainly wrong in contending (J.S. 16-20) that the FDA's regulations governing imitation products are inconsistent with the FDCA and therefore do not preempt New York's labeling requirements. The court of appeals joined two other appellate courts in concluding that the FDA's regulations are valid. See *National Milk Producers Federation* v. *Harris,* 653 F.2d 339 (8th Cir. 1981); *Federation of Homemakers* v. *Schmidt,* 539 F.2d 740 (D.C. Cir. 1976). As the court of appeals recognized (J.S. App. 15a), the FDA is entitled to substantial deference in administering the FDCA. Its longstanding regulations represent a reasonable interpretation of a statutory term that Congress left undefined.

The Commissioner argues (J.S. 17-20) that the regulations are invalid because they depart from a prior interpretation of the term that the government applied, with this Court's approval, in cases decided more than thirty years ago. See *62 Cases of Jam* v. *United States,* 340 U.S. 593 (1951); *Federal Security Administration* v. *Quaker Oats Co.,* 318 U.S. 218 (1943). However, as the court of appeals stated, "the earlier and undeniably reasonable judicial construction of imitation did not 'prevent the promulgation of an equally reasonable definition by the agency charged with administering the [FDCA].' " J.S. App. 15a, quoting *Federation of Homemakers,* 539 F.2d at 743. Indeed, the FDA is entitled to "ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.' " *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Automobile*

Insurance Co., 463 U.S. 29, 42 (1983), quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968).[1]

The Commissioner attempts to preserve New York's "imitation cheese" labeling requirements, as they applied to packaged poultry and meat products, by arguing that the USDA has improperly adopted FDA's nutritional equivalence standard. The USDA announced that it would follow the FDA's standard in *In re Castleberry's Food Co.*, 40 Agric. Dec. 1262 (1981). The Commissioner contends (J.S. 21-22) that formal rulemaking was instead required. However, it is well established that an agency has broad discretion in choosing to develop and announce its policies through case-by-case adjudication or through rulemaking. *E.g.*, *NAACP* v. *FPC*, 425 U.S. 662, 668 (1976); *NLRB* v. *Bell Aerospace Co*, 416 U.S. 267, 290-295 (1974). As the court of appeals explained (J.S. App. 16a-19a), the USDA was fully justified in choosing to follow the FDA's practice in the course of an individual adjudication.[2] As the court also stated (*id.* at 19a-20a), the specific preemption provisions of the PPIA and the FMIA, prohibiting labeling "in addition to" that required by the statutes, would preempt the New York labeling requirements in any event. See 21 U.S.C. 467e (PPIA); 21 U.S.C. 678 (FMIA). See also *Jones* v. *Rath Packing Co.*, 430 U.S. at 528-532.

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[1]The FDA offered a "reasoned analysis for the change," *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42, stating that the "[v]ast strides in food technology since [the FDCA] was enacted" have eliminated the need for treating all food substitutes as "necessarily inferior" and that a contrary rule, under modern circumstances, would be a "disservice to consumers." 38 Fed. Reg. 2138 (1973). The court of appeals properly deferred to the FDA's expert view on this matter.

[2]The court also noted (J.S. App. 18a-19a) that the USDA's decision could be understood as a general statement of policy that would not be subject to formal rulemaking requirements. Since the *Castleberry* decision, the USDA has initiated formal rulemaking on the subject. See 48 Fed. Reg. 35654 (1983).

In sum, the court of appeals was plainly correct in holding that federal law preempted New York's "imitation cheese" labeling requirements, and the questions raised by the Commissioner's appeal are not substantial.[3]

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[3]GMA's petition for a writ of certiorari (No. 84-1807) raises challenges, under the Commerce Clause and equal protection principles, to the validity of those portions of Section 63 requiring restaurants to notify customers, through signs, menu addenda and container labels, that the restaurant uses "imitation cheese." See N.Y. Agric. & Mkts. Law § 63 (Consol. Supp. 1984-1985). The federal respondents took no position on those issues in the court of appeals because they generally do not assert their regulatory jurisdiction over the labeling of products in restaurants. But see 21 C.F.R. 101.10 (nutrition labeling of restaurant foods). We continue to express no view on the merits of this aspect of the case.

We note that the decision of the court of appeals sustains the Commissioner's power to control the labeling of restaurant condiment containers that contain "imitation cheese." It is conceivable that conflicts between the federal and state regulatory schemes might arise with respect to products (such as Parmesan cheese) that often appear on restaurant tables in retail containers. However, these speculative fact-bound problems were not resolved by the court of appeals and should be left to the future. They do not, at present, raise a question of sufficient importance to warrant this Court's review.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed in No. 84-1794.

Respectfully submitted.

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